

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DANIEL HARPER,

Plaintiff,

v.

TAMMY CAMPBELL, *et al.*,

Defendants.

Case No. 1:24-cv-1549 EPG (PC)

ORDER TO ASSIGN A DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF'S IFP
APPLICATION BE DENIED AND THAT
PLAINTIFF BE REQUIRED TO PAY THE
FILING FEE IN FULL IF HE WANTS TO
PROCEED WITH THIS ACTION

(ECF No. 2)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

Plaintiff Daniel Harper is a state prisoner proceeding *pro se* in this civil rights action. (ECF No. 1). On January 2, 2025, Plaintiff filed an application to proceed *in forma pauperis* in this action. (ECF No. 2).

Because the Court concludes that Plaintiff had at least three "strikes" prior to filing this action and because he was not in imminent danger of serious physical injury at the time he filed it, the Court will recommend that Plaintiff be required to pay the \$405 filing fee in full if he wants to proceed with the action.

I. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)

Pertinent here is the so called "three strikes provision" of 28 U.S.C. § 1915:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while

incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). In determining whether a dismissal counts as a “strike” under § 1915(g), “the reviewing court looks to the dismissing court’s action and the reasons underlying it. . . . This means that the procedural mechanism or Rule by which the dismissal is accomplished, while informative, is not dispositive.” *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (internal citation omitted). The Ninth Circuit has “interpreted the final form of dismissal under the statute, ‘fail[ure] to state a claim upon which relief may be granted,’ to be essentially synonymous with a Federal Rule of Civil Procedure 12(b)(6) dismissal.” *Id.* (alteration in original).

II. ANALYSIS

A. Strikes

Plaintiff filed this action on December 18, 2024. (ECF No. 1). The Court takes judicial notice¹ of the following four cases, each of which counts as a “strike”: (1) *Harper v. Sacramento County Sheriff*, No. 2:07-cv-00748-ALA (E.D. Cal.) (complaint dismissed with leave to amend for failure to state a claim; case dismissed on November 14, 2007, for failure to file an amended complaint); (2) *Harper v. Wilcox*, No. 2:07-cv-01158-LKK-KJM (E.D. Cal.) (case dismissed on January 28, 2008, for failure to state a claim); (3) *Harper v. Costa*, No. 2:07-cv-2149-LKK-DAD (E.D. Cal.) (case dismissed on August 31, 2009, for failure to state a claim); and (4) *Harper v. Morgan*, No. 2:08-cv-2526-GGH (E.D. Cal.) (case dismissed on June 16, 2009, for failure to state a claim).

Moreover, Plaintiff has previously been denied IFP status by at least two other courts because of his three-striker status. *See Harper v. Marquez*, No. 2:24-cv-1194-DJC-SCR (ECF No. 13); *Harper v. Powell*, 2:24-cv-1343-TLN-AC (ECF No. 17).

B. Imminent Danger

Because Plaintiff had at least three “strikes” prior to filing this action, Plaintiff is precluded from proceeding *in forma pauperis* unless Plaintiff was, at the time the complaint was

¹ “In particular, a court may take judicial notice of its own records in other cases” *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 filed, in imminent danger of serious physical injury. The availability of the imminent danger
 2 exception “turns on the conditions a prisoner faced at the time the complaint was filed, not at
 3 some earlier or later time.” *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007).
 4 “Imminent danger of serious physical injury must be a real, present threat, not merely speculative
 5 or hypothetical.” *Blackman v. Mjening*, No. 1:16-CV-01421-LJO-GSA (PC), 2016 WL 5815905,
 6 at *1 (E.D. Cal. Oct. 4, 2016). To meet his burden under § 1915(g), Plaintiff must provide
 7 “specific fact allegations of ongoing serious physical injury, or a pattern of misconduct
 8 evidencing the likelihood of imminent serious physical injury.” *Martin v. Shelton*, 319 F.3d 1048,
 9 1050 (8th Cir. 2003). “[V]ague and utterly conclusory assertions” of imminent danger are
 10 insufficient. *White v. Colorado*, 157 F.3d 1226, 1231-32 (10th Cir. 1998). The “imminent danger”
 11 exception is available “for genuine emergencies,” where “time is pressing” and “a threat . . . is
 12 real and proximate.” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

13 Additionally, there is a nexus requirement between the danger alleged and the claims
 14 asserted: “Thus, in order to qualify for the § 1915(g) imminent danger exception, a three-strikes
 15 prisoner must allege imminent danger of serious physical injury that is both fairly traceable to
 16 unlawful conduct alleged in his complaint and redressable by the court.” *Ray v. Lara*, 31 F.4th
 17 692, 701 (9th Cir. 2022). Because Plaintiff is *pro se*, in making the imminent danger
 18 determination, the Court must liberally construe Plaintiff’s allegations. *Andrews*, 493 F.3d at
 19 1055.

20 Plaintiff’s complaint alleges that, from September 2024 to November 2024, Plaintiff
 21 “submitted a numerous amount of inmate appeals (602s).”² (ECF No. 1 at 5). Plaintiff alleges he
 22 was not sent the appeal responses in time, violating California Code of Regulations. (*Id.* at 6).
 23 Plaintiff references numerous exhibits, none of which are attached to the complaint.

24 Such allegations are insufficient to show that there is a real and imminent threat to
 25 Plaintiff’s personal safety under the standards described above. None of these allegations fairly
 26 implicate an ongoing serious physical injury or a pattern of misconduct evidencing the likelihood
 27 of imminent serious physical injury to Plaintiff. While Plaintiff checked the box “excessive force

28 ² Plaintiff’s complaint is not legible in some places. The above summary reflects the Court’s best attempt
 to summarize Plaintiff’s allegations.

1 by an officer” in the section of the complaint form asking him to identify the issue involved (ECF
2 No. 1 at 5), Plaintiff does not describe the use of force incident or when it occurred. Nothing in
3 the complaint indicates that by at the time Plaintiff filed his complaint, he was in imminent
4 danger of excessive force being used against him. *See Driver v. Pohovich*, No. 2:22-CV-1672 DB
5 P, 2023 WL 2394154, at *2 (E.D. Cal. Feb. 1, 2023), *report and recommendation adopted*, 2023
6 WL 8004324 (E.D. Cal. Nov. 17, 2023) (concluding that Plaintiff did not meet the imminent
7 danger exception where “[t]here [was] nothing in the complaint that would indicate plaintiff was
8 under threat of imminent danger based on the excessive force incidents” alleged in the complaint
9 that purportedly occurred about two months before filing the complaint).

10 Accordingly, because Plaintiff is a “three-striker” and does not appear to have been in
11 imminent danger when he filed this action, the Court will recommend that Plaintiff be required to
12 pay the \$405 filing fee in full if he wants to proceed with the action.

13 **III. CONCLUSION, ORDER, AND RECOMMENDATIONS**

14 Accordingly, IT IS ORDERED that the Clerk of Court shall assign a District Judge to this
15 case.

16 And IT IS RECOMMENDED that:

- 17 1. Plaintiff’s application to proceed *in forma pauperis* be denied. (ECF No. 2).
- 18 2. Pursuant to 28 U.S.C. § 1915(g), Plaintiff be directed to pay the \$405.00 filing fee in
19 full if he wants to proceed with this action.
- 20 3. Plaintiff be advised that failure to pay the filing fee in full will result in the dismissal
21 of this case.

22 These findings and recommendations will be submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)
24 days after being served with these findings and recommendations, Plaintiff may file written
25 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
26 Findings and Recommendations.” Any objections shall be limited to no more than 15 pages,
27 including exhibits.

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1 Plaintiff is advised that failure to file objections within the specified time may result in the
2 waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing
3 *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

4 IT IS SO ORDERED.

5
6 Dated: **January 10, 2025**

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE